

AF/1751
[Signature]

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Patent Application of

Estes *et al.*

Application No. 10/027,160

Filed: December 20, 2001

For: NON-AQUEOUS WASHING
APPARATUS AND METHOD

) Group Art Unit 1751

) Examiner: Gregory E. Webb

I hereby certify that this document is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on May 24, 2005.

[Signature]

Commissioner for Patents
Alexandria, VA 22313-1450

TRANSMITTAL OF APPELLANTS' BRIEF ON APPEAL

Dear Sir:

Appellants submit, in triplicate, Appellants' Brief on Appeal under 37 C.F.R. § 1.192 in support of the Notice of Appeal filed on 28 March 2005. Appellants request that the amount of \$500 for the appeal brief fee as required by 37 C.F.R. § 41.20(b)(2) be charged to the credit card provided on the attached Credit Card Payment Form.

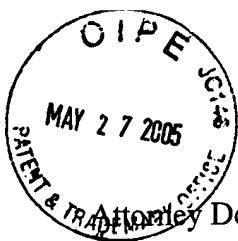
The Commissioner is hereby authorized to credit overpayments or to charge any deficiency in a required fee to Deposit Account No. 19-3140. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

Dated: MAY 24, 2005

By: [Signature]
Daniel W. Celandor, Ph.D. Reg. No. 52,710

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Attorney Docket No. 09793070-0439

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Daniel W. Ahlberg

Commissioner for Patents
Alexandria, VA 22313-1450

APPELLANTS' BRIEF ON APPEAL

Dear Sir:

In accordance with the provisions of 37 C.F.R. § 1.192, Appellants submit this Brief in support of the Appeal for the above-referenced application.

I. REAL PARTY IN INTEREST

The real party in interest in the present appeal is the Assignee, Whirlpool Corporation, a corporation of the state of Delaware. The Assignment was recorded in the U.S. Patent and Trademark Office.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals and no related interferences.

III. STATUS OF CLAIMS

Claims 79-81 and 83-88 are pending in this application, of which claims 79, 86, 87, and 88 are independent. Claim 88 stands allowed. Claims 1-78 and 82 were canceled. The rejections of claims 79-81 and 83-87 are appealed.

IV. STATUS OF AMENDMENTS

A Request For Reconsideration After Final was filed on 21 January 2005, wherein no amendments of the claims were made. An Advisory Action was mailed 9 March 2005, wherein the Request For Reconsideration After Final had been considered but rejected, because the request did not place the application in condition for allowance and raised a new issue that Applicants address below.

V. SUMMARY OF INVENTION

The present invention relates to compositions employed in the home for laundering clothing and fabrics. In particular, these compositions represent novel formulations for home laundering of a fabric load using a wash liquor that comprises a combination of a substantially inert, non-reactive working fluid and at least one washing additive. Because the working fluid is substantially inert and non-reactive (*i.e.*, it displays no deterative properties), the washing additive represents the actual cleaning agent of the wash liquor. The washing additive may comprise a co-solvent, a performance enhancer, or both, wherein the co-solvent and performance enhancer each has deterative properties that are required to remove particulates, film soils, and stains from the fabric or that assist in the removal of particulates, film soils, and stains from the fabric. The

sole purpose of the working fluid is to provide a medium wherein the co-solvents, performance enhancers, and other additives are brought together in a multi-phase mixture to promote cleaning of the clothing and fabrics. (See Specification at page 1, ll. 1-20 and page 11, ll. 1-18.)

In the context of prior art aqueous-based washing methods, water is the preferred “working fluid;” however, water is commonly viewed by those skilled in the art (e.g., the cleaning industry) to have no significant deterative properties. In the context of Applicants’ disclosure and claims that are drawn to non-aqueous washing methods, the non-aqueous bulk fluid that represents “working fluid” is non-reactive in the sense that the bulk fluid has no deterative properties as commonly known and understood by those skilled in the art.

VI. ISSUES

The issues on Appeal are as follows:

(1) Whether it is Applicants’ burden to prove that the asserted prior art under a section 102(b) rejection fails to meet a chemical property limitation of the claims at issue where the Examiner has provided no proof that the prior art does teach such a limitation, that is, where the Examiner has failed to present a prima facie case of anticipation; and

(2) Whether the Applicants’ rebuttal of a section 102(b) rejection must be supported by evidentiary proof that the prior art fails to meet a chemical property limitation of the claims-at-issue.

VII. GROUPING OF CLAIMS

The claims do not stand or fall together. Specific arguments as to the separate patentability of all rejected claims have been presented.

VIII. ARGUMENT

The Examiner has pointed out that U.S. Patent No. 5,116,426 to Asano *et al.* describes the use of a dichloropentafluoropropane as a cleaning solvent. To establish that the Applicants' invention as claimed is anticipated by Asano *et al.*, the Examiner presents logically inconsistent arguments that are unsupported based upon the prior art of record. First, the Examiner assumes, without support from any cited prior art or other technical source or authority, that hydrofluoroethers are functionally equivalent to dichloropentafluoropropanes. Second, the Examiner ignores the plain teaching of Applicant's specification that adopts a scientifically sound definition of a "working fluid" with clear and unequivocal language to mean "a fluid that possess no deterative properties" or a non-reactive fluid that cannot behave as a cleaning solvent. Instead, the Examiner provides his own definition of a "non-reactive" fluid to be a cleaning solvent because, in the Examiner's opinion, cleaning is merely a process of solvation rather than a chemical reaction. The combination of these two errors clearly establishes that the Examiner has failed to meet the Office's burden of establishing that Asano *et al.*'s dichloropentafluoropropanes read on working fluid as being a non-reactive fluid in accordance with the claimed invention. Third, the Examiner improperly imposes a duty on Applicants to proffer evidence that proves that the prior art fails to meet the chemical property limitation of a working fluid being non-reactive, despite the fact that the Examiner has not come forward with any proof that the prior art teaches this limitation.

A. The applied art

The Asano *et al.* reference teaches the use of a dichloropentafluoropropane as a cleaning solvent for various applications, such as a cleaning agent for dry cleaning, a degreasing agent,

and a cleaning agent for removing a buffing agent. *See, e.g.*, U.S. Patent No. 5,116,426, col. 2, ll. 29-32.

B. The Examiner's rejection and Applicants' reply

In paragraphs 5 and 10 of the Final Official Action dated November 29, 2004, the Examiner stated that he "has found a reference [Asano *et al.*] teaching hydrofluoroethers in combination with perfumes." In paragraph 6 of the Non-final Official Action dated July 14, 2004, the Examiner implied, without support from any cited prior art or other technical source or authority, that Asano *et al.* teaches that a dichloropentafluoropropane as a cleaning solvent is equivalent to a "working fluid." According to the Examiner, a cleaning solvent is equivalent to a "working fluid" because, in his view, both fluids are non-reactive (paragraph 6 of the Final Official Action dated November 29, 2004). To cinch his arguments, the Examiner chose to discount the Applicants' specification for the explicit definition of "working fluid" being "non-reactive" as not conforming to the "definition used in chemistry." (*Id.*)

In response, Applicants emphasized that the Asano *et al.* reference never teaches or suggests the use of hydrofluoroethers as a cleaning solvent, as a working fluid, or as any component used in conjunction with the method of cleaning a substrate using dichloropentafluoropropanes. Applicants further maintained that hydrofluoroethers and dichloropentafluoropropanes are such functionally distinct chemicals that nobody of ordinary skill in the art would read the Asano *et al.* specification as teaching that these compounds can serve the identical function as a "working fluid" as described in Applicants' specification.

Furthermore, Applicants define a "working fluid" with clear and unequivocal language: a working fluid is "a fluid that possesses no deterative properties," whereas a compound or fluid

that has “detergent action” is one “that is required to remove particulates, film soils, and stains or that assist in the removal of particulates, film soils, and stains.” *See* specification at page 11, ll. 2-4, 8-10, and 13-18. Applicants unambiguously define “substantially non-reactive” as it modifies a working fluid and components thereof to mean “a non-solvent, non-detergent fluid that under ordinary or normal washing conditions, *e.g.*, at pressures of -1 to 50 atmospheres and temperatures of from about 10° to about 45° C, does not appreciably react with fibers of the fabric load being cleaned, the stains and soils on the fabric load, or the washing additives combined with the component to form the wash liquor.” *See* Specification at page 1, ll. 9-15. Furthermore, Applicants characterize cleaning solvents as being different from the working fluid of their invention: “a solvent that is different from the IWF [working fluid] in that its sole purpose is to provide detergent properties not met by the performance enhancers will hereinafter be referred to as a co-solvent.” *Id.* at page 11, ll. 13-15. A person of ordinary skill in the field would readily understand that this definition indicates that a non-reactive working fluid does not react with fabric fibers nor with stains and soils on the fabric. Therefore, a non-reactive working fluid, by definition, cannot perform any process that disrupts the chemical interaction between stains and soils on fabric fibers, including the Examiner’s suggested solvation process.¹

An applicant is entitled to be his or her own lexicographer and may rebut the presumption that claim terms are to be given their ordinary and customary meaning by clearly setting forth a definition of the term that is different from its ordinary and customary meaning(s). *See In re*

¹ Solvation would liberate only impurities that are physically trapped within the interstitial spaces of a fabric weave pattern. Most impurities and stains, however, are bonded to fabrics through chemical interactions. Nevertheless, the Applicants’ specification clearly states that a non-reactive working fluid does not interact with stains or soils on the fabric load. *See* specification at page 1, ll. 9-15. Thus, Applicants’ “working fluid” lacks solvation activity as well. This further distinguishes Asano *et al.*’s cleaning solvents from Applicants’ working fluids.

Paulsen, 30 F.3d 1475, 1480 (Fed. Cir. 1994) and MPEP § 2111.01. Where an explicit definition is provided by the applicant for a term, that definition will control interpretation of the term as it is used in the claim. *Toro Co. v. White Consolidated Indus. Inc.*, 199 F.3d 1295, 1301 (Fed. Cir. 1999). Any special meaning assigned to a term “must be sufficiently clear in the specification that any departure from common usage would also be so understood by a person of experience in the field of the invention.” *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1988). *See also* MPEP § 2173.05(a).

By Applicants’ carefully chosen and unambiguous language, a non-reactive working fluid is neither a cleaning solvent (*i.e.*, a solvent with deterative action) nor a chemically reactive solution, as that term is used in the instant specification. And this meaning would be readily understood by a person of experience in the field reading the Applicants’ specification and claims. Therefore, Asano *et al.*’s cleaning solvents do not read upon working fluid, and the Asano *et al.* reference does not anticipate the Applicants’ invention as claimed.

The Examiner responded to this in an Advisory Action (mailed 9 March 2005) stating that

[t]he applicant argues that the limitation of “working fluid” has not been met. However, the examiner strongly disagrees. The chlorofluorocarbon recited by the examiner to read on the “working fluid” is 1) non-reactive; 2) non-aqueous; 3) non-oleophilic and 4) apolar. The applicant has submitted no evidence to the contrary but only argues that the prior art compound do not meet [sic] these functional limitations. The examiner has to the best of his ability found chemicals meeting these properties. However as no testing facilities are available to the examiner, such functional limitations must be supported by evidence demonstrating the failings of the prior art. As the applicant has not properly proven that the prior art fails to meet these functional limitation [sic] the examiner must maintain previous rejections.

C. The Argument

In order to establish a *prima facie* case of anticipation, a single prior art reference must expressly or inherently describe each and every element as set forth in the claim(s). See MPEP § 2131, citing *Verdegall Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). The examiner bears the burden of establishing a *prima facie* case of anticipation. *In re King*, 801 F.2d 1324, 1327 (CCPA 1986); *In re Wilder*, 429 F.2d 447, 450 (CCPA 1970). If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to a grant of the patent. *In re Grabiak*, 769 F.2d 729, 733 (Fed. Cir. 1985). Only if that burden is met, does the burden of going forward shift to the applicant. *In re King*, 801 F.2d at 1327; *In re Wilder*, 429 F.2d at 450. Once a *prima facie* case is established and rebuttal evidence is submitted, the ultimate question becomes whether, based upon the totality of the record, the examiner carried his burden of proof by a preponderance of the evidence. *In re Oeticker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

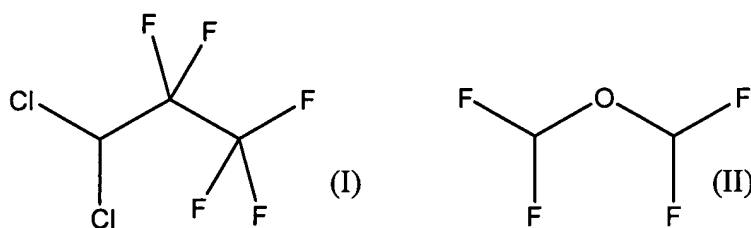
The essence of the Examiner's understanding of the Asano *et al.* reference is that it discloses: cleaning solvents are working fluids; dichloropentafluoropropanes are working fluids because they are cleaning solvents; and hydrofluoroethers and dichloropentafluoropropanes are functionally equivalent as working fluids. The Applicants maintain that the Examiner has misconstrued Asano *et al.* to arrive at his conclusion that this reference discloses each and every limitation of the invention as claimed, particularly as drawn to the limitation of "working fluid" being "non-reactive."

First, Applicants assert that the Examiner is reading more into the Asano *et al.* disclosure than is actually possible. For example, the specific mention of "hydrofluoroethers" and "working fluid" is simply absent in the Asano *et al.* disclosure. The Asano *et al.* reference is

narrowly focused on the use of dichloropentafluoropropanes as cleaning solvents *and nothing more*.

Second, Applicants maintain that the Examiner has failed to explain how hydrofluoroethers and dichloropentafluoropropanes both act as cleaning agents. The Examiner cannot rely upon Asano *et al.* for this teaching because Asano *et al.* is completely silent about hydrofluoroethers. The Examiner does not rely upon anything (*e.g.*, another prior art reference or technical source or authority) other than conjecture and opinion to support his conclusions on this matter.

In fact, the structural dissimilarities between hydrofluoroethers and dichloropentafluoropropanes teach away from the conclusion that these compounds belong to the same genus having purportedly equivalent functional activities, such as behaving as a cleaning solvent in this case. Though the Applicants have previously given the Examiner the benefit of the doubt as to his understanding of the chemical differences between these species, a demonstration of the structural differences between these classes of chemical compounds is illustrated below for the benefit of the Board:



Compound (I) represents one of the preferred dichloropentafluoropropane compounds that is disclosed in the Asano *et al.* reference. Compound (II) represents a typical chemical species belonging to the class of hydrofluoroethers that is disclosed and claimed in the Applicants' specification, and which represents a class of compounds *not disclosed* in the Asano

et al. reference. Furthermore, the chlorine substituents of compound (I) and the oxygen substituent of compound (II) dramatically impact the physical properties of each system and provide a basis for the structural differences that distinguish Applicants' invention from the Asano *et al.* reference.

Examiner is simply incorrect in his belief that Asano *et al.* teaches the use of hydrofluoroethers for anything, let alone their use as a cleaning solvent.

Critically important to this Appeal is that the Board recognize and reject the Examiner's decision to disregard the Applicants' specification for the definition of "working fluid" being "non-reactive" and to carefully craft his own definition of these terms to support his claim rejections. The Examiner is not permitted to discount or ignore the Applicants' written description for the clear disclosure of definitions necessary to understand the scope of claim language merely because a definition may conflict with the Examiner's personally held views of chemical principles. The Applicants' written description defines the limitation of "working fluid" being "non-reactive" in precise, unambiguous, and scientifically sound terms. *See, e.g.*, specification at p. 1, ll. 9-15; p. 11, ll. 2-18. When the claims are viewed through the lens of the Applicants' specification, a working fluid, as claimed in the instant application, cannot serve as the same thing as a cleaning solvent of the Asano *et al.* reference.

The Examiner has failed to meet his burden of establishing a *prima facie* case of anticipation by the Asano *et al.* reference. Accordingly, Applicants are entitled a grant of a patent on the claims at issue.

Withdrawal of the instant rejections is also warranted because the Examiner improperly required Applicants overcome a section 102(b) rejection by providing evidentiary proof that the

prior art fails to meet a functional limitation of the claim(s)-at-issue. *See* Advisory Action dated 9 March 2005, continuation sheet.

A rejection based upon section 102(b) can be overcome by one of only four specific actions available to applicants:

(A) Persuasively arguing that the claims are patentably distinguishable from the prior art;

(B) Amending the claims to patentably distinguish over the prior art;

(C) Perfecting priority under section 120 in accordance with 37 CFR 1.78(a); or

(D) Perfecting priority claim under section 119(e) in accordance with 37 CFR 1.78(a).

See MPEP § 706.02(b).

The MPEP does not permit the Examiner to impose a duty on the Applicants to provide evidentiary proof that the prior art fails to meet a functional limitation as a basis for overcoming a section 102(b) rejection. To require that Applicants *submit evidence* to buttress an argument that the claims are patentably distinguishable from the prior art, the Examiner improperly raises Applicants' burden beyond that required of other applicants and creates non-uniformity in prosecution practice within the Office. More importantly, such a practice, if allowed, would impose an undue burden, time, and expense on the Applicants who would be required to perform additional experimentation to rebut every reference that this Examiner presents as a basis of a section 102(b) rejection. This is not the standard set forth in the MPEP and such a practice should be rejected in the instant case. In fact, it is the Examiner's burden to establish *the prima facie* case of showing that the cited prior art reference meets the limitations of the claims-at-

issue, which he has not done and which he specifically states that he cannot do from his

Advisory Action dated 9 March 2005:

The examiner has to the best of his ability found chemicals meeting these properties. However as no testing facilities are available to the examiner, such functional limitations must be supported by evidence demonstrating the failings of the prior art. As the applicant has not properly proven that the prior art fails to meet these functional limitation [sic] the examiner must maintain previous rejections.

Finally, Applicants emphasize that at no time during the prosecution of the claims-at-issue did the Examiner ever suggest that Applicants had to provide a heightened evidentiary showing in order to overcome a section 102(b) rejection. It was only upon the issuance of the Advisory Action dated 9 March 2005, which occurred well after the Examiner closed the prosecution phase of the case (29 November 2004), that the Examiner placed Applicants on notice of this requirement.

D. Specific arguments as to the separate patentability of selected claims

Concerning claim 79, the Asano *et al.* reference does not disclose “a substantially non-reactive, non-aqueous, non-oleophilic, apolar working fluid.”

For each claim beyond claim 79, Applicants provide specific arguments as to separate patentability.

Concerning claim 80, the Asano *et al.* reference further does not disclose a co-solvent selected from the group consisting of water, alcohol, ether, glycol, ester, ketone, and aldehyde.

Concerning claim 81, the Asano *et al.* reference further does not disclose that the working fluid comprises a fluorine-containing compound selected from the group consisting of perfluorocarbons, hydrofluoroethers, fluorinated hydrocarbons, and fluoroinerts.

Concerning claim 83, the Asano *et al.* reference further does not disclose a working fluid as a liquid.

Concerning claim 84, the Asano *et al.* reference further does not disclose a working fluid having the combination of listed properties.

Concerning claim 85, the Asano *et al.* reference further does not disclose a working fluid being a hydrofluoroether.

Concerning claim 86, the Asano *et al.* reference does not disclose the combination of a non-reactive, non-aqueous, non-oleophilic, apolar working fluid, at least one first washing additive selected from the group consisting of: a surfactant, enzyme, and bleach and at least one second washing additive selected from the group consisting of: ozone, an ultraviolet light absorber, and deodorizer.

Concerning claim 87, the Asano *et al.* reference does not disclose the mixture of a non-reactive, non-aqueous, non-oleophilic, apolar working fluid, a fragrance, at least one first washing additive selected from the group consisting of: a surfactant, enzyme, and bleach, at least one second washing additive selected from the group consisting of: ozone, an ultraviolet light absorber, and deodorizer and at least one co-solvent selected from the group consisting of water, alcohol, ether, glycol, ester, ketone, and aldehyde, and wherein the mixture is sufficiently stable for a fabric washing application.

IX. Conclusion

Applicants maintain that the prosecution of the instant application has reached an impasse because the Examiner does not understand that the kernel of the invention is the use of a non-

aqueous bulk fluid whose main purpose is to serve as a carrier to deliver mechanical energy, chemical energy (in the form of an additive), and/or thermal energy to the fabric load without the bulk fluid chemically acting on the load. That breakthrough concept was such a significant departure from the historical approach of using a solvent as a bulk fluid that it required the coining of a new lexicon (termed "working fluid") to describe and claim it. The Examiner improperly rejects that lexicography based on how the terms were used before the invention was made. But that is the point. The fact that the prior terminology is deficient to describe the invention may itself be evidence of the novelty of the invention. By challenging the lexicon, the Examiner is sidestepping the direct application of the lexicon to the claims. Were he to concede that the claimed invention involves use a special class of quasi-inert bulk fluids that the Applicants have termed as "working fluids," he would be forced to fully understand the various characteristics that would identify members of that class of quasi-inert chemicals and use that knowledge to review prior art chemicals used to clean fabric to determine if they are in that special class. To further avoid that, he has improperly attempted to pass the burden of classifying the chemicals to Applicants.

Applicants respectfully submit that the outstanding rejections should be reversed, and that the application is in condition for allowance.

Respectfully submitted,

Dated: May 24, 2005

By:



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APPENDIX

Claims on Appeal

Claims 1-78 (canceled).

79. (Previously presented) A wash liquor composition for use in laundering a fabric load, comprising:

(a) a substantially non-reactive, non-aqueous, non-oleophilic, apolar working fluid that has a KB value less than or equal to 30;

(b) at least one washing additive comprising a fragrance; and

(c) wherein the at least one washing additive and working fluid are mixed prior to use in laundering.

80. (Previously presented) The wash liquor composition of claim 79, further comprising: at least one co-solvent selected from the group consisting of water, alcohol, ether, glycol, ester, ketone, and aldehyde, and wherein the mixture is sufficiently stable for a fabric washing application.

81. (Previously presented) The wash liquor composition of claim 79, wherein the working fluid comprises a fluorine-containing compound selected from the group consisting of perfluorocarbons, hydrofluoroethers, fluorinated hydrocarbons, and fluoroinerts.

82. (Canceled).

83. (Previously presented) The wash liquor composition of claim 79, wherein the working fluid is a liquid.

84. (Previously presented) The wash liquor composition of claim 79,

(d) wherein the working fluid has a surface tension of less than or equal to 35 dynes/cm²;

(e) wherein the working fluid has an oil solvency greater than water without being oleophilic;

(f) wherein the working fluid has a solubility in water of less than about 10%;

(g) wherein the working fluid has a viscosity less than water under normal washing conditions;

(h) wherein the working fluid has a pH from about 6.0 to about 8.0;

(i) wherein the working fluid has a vapor pressure less than the vapor pressure of water; and

(j) wherein the working fluid has a flash point of greater than or equal to 145°C.

85. (Previously presented) The wash liquor composition of claim 79, wherein the working fluid is hydrofluoroether.

86. (Previously presented) A wash liquor composition for use in laundering a fabric load, comprising:

(a) a non-reactive, non-aqueous, non-oleophilic, apolar working fluid that has a KB value less than or equal to 30;

(b) a fragrance;

(c) at least one first washing additive selected from the group consisting of: a surfactant, enzyme, and bleach; and

(d) at least one second washing additive selected from the group consisting of: ozone, an ultraviolet light absorber, and deodorizer.

87. (Previously presented) A wash liquor composition for use in laundering a fabric load, comprising:

(a) a non-reactive, non-aqueous, non-oleophilic, apolar working fluid that has a KB value less than or equal to 30;

(b) a fragrance;

(c) at least one first washing additive selected from the group consisting of: a surfactant, enzyme, and bleach;

(d) at least one second washing additive selected from the group consisting of: ozone, an ultraviolet light absorber, and deodorizer;

(e) at least one co-solvent selected from the group consisting of water, alcohol, ether, glycol, ester, ketone, and aldehyde, and wherein the mixture is sufficiently stable for a fabric washing application; and

(f) wherein the working fluid, fragrance, at least one first washing additive, at least one second washing additive; and the at least one co-solvent are mixed prior to use in laundering.

88. (Previously presented) A wash liquor composition for use in laundering a fabric load, comprising:

(a) a substantially non-reactive, non-aqueous, non-oleophilic, apolar working fluid that has a KB value less than or equal to 30;

(b) at least one washing additive comprising a fragrance;

(c) wherein the at least one washing additive and working fluid are mixed prior to use in laundering.

(d) wherein the working fluid comprises a fluorine-containing compound selected from the group consisting of perfluorocarbons, hydrofluoroethers, fluorinated hydrocarbons, and fluoroinerts; and

(e) wherein the fluorine-containing compound is $(CF_3(CF_2)_n)_3N$, where n is an integer from 4 to 20.